COURT OF APPEALS II NO. 46877-8-II
PIERCE COUNTY NO. 14-2-08028-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

BARRY E. NILSEN, a married man,

Petitioner,

v.

QUALITY LOAN SERVICING CORPORATION OF WASHINGTON, a Washington Corporation; MCCARTHY HOLTHUS, LLP, a California Limited Liability Partnership; NATIONSTAR MORTGAGE, LLC, a National Mortgage Services Company; DEUTSCHE BANK AS TRUSTEE FOR RALI SERIES 2007-QO2, a Foreign Trust Company; RALI SERIES 2007-QO2, a Foreign Trust; JOHN DOES 1-99,

Respondents.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal involves the nonjudicial foreclosure against Barry Nilsen ("Nilsen") by (1) Deutsche Bank., in its capacity as trustee on behalf of RALI Series 2007-Q02 ("Deutsche Bank"); (2) Nationstar Mortgage, LLC ("Nationstar"); (3) Quality Loan Services Corp. of Washington ("Quality"); and (4) McCarthy Holthus, LLP (M & H) (collectively the Respondents) that failed to comply with the Deeds of Trust Act ("DTA") causing Nilsen actionable injury under Ch. 19.86 RCW, the Consumer Protection Act ("CPA"). The primary issue is whether the Respondents acted unfairly or deceptively when they failed to accurately disclose the stakeholder of Nilsen's note and initiated a second nonjudicial foreclosure proceeding against Nilsen without complying with numerous provisions of the DTA.

The Superior Court erred when it granted Summary Judgment for the Respondents by two orders entered on October 10, 2014 and October 13, 2014. CP 584-88. As a matter of law, Respondents were not entitled to summary judgment when both the evidence and binding authority supported a finding there was a genuine issue of material fact as to whether Respondents actions violated the DTA and CPA causing Nilsen injury. Nilsen respectfully requests this Court reverse the Trial Court's decisions and remand this case for trial.

II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in granting the Respondents' request for summary judgment when Respondents failed to introduce admissible and credible evidence to show there was no genuine issue of material fact regarding whether Nationstar was the beneficiary under RCW 61.24.005(2).

2. The Superior Court erred in granting the Respondents' request for summary judgment regarding Nilsen' CPA claim when Nilsen put forth admissible evidence demonstrating genuine issues of material fact exist as to whether Respondents violated the DTA and caused him injury, including:

    a. Respondents' action of misrepresenting the owner of Nilsen's note and preventing Nilsen access to the stakeholder;

    b. Respondents' action of initiating a nonjudicial foreclosure when Respondents' own evidence established Nationstar was not the beneficiary under RCW 61.24.005(2);

    c. Quality's utilization of the DTA without authority when it was appointed successor trustee by multiple entities who were not the beneficiary in violation of RCW 61.24.010(2)

    d. Quality's violation of its duty of good faith under RCW 61.24.010(4)

    e. Quality's improper reliance upon a declaration by Nationstar as a basis for issuing a notice of trustee sale in violation of RCW 61.24.030(7); and

    f. Quality's failure to maintain a physical address in the state of Washington and its blatant disregard for Nilsen's correspondence in violation of RCW 61.24.030(6).

III. STATEMENT OF THE CASE

Nilsen has owned the property located at 1801 South Yakima Avenue, Tacoma, WA since 2006. Nilsen obtained the property by signing an adjustable rate note with Paul Financial, LLC on December 14, 2006. CP 159-166. In addition, Nilsen signed a deed of trust, which listed the Trustee as First American Title Insurance Company and the beneficiary as MERS. CP 174 at ¶¶ D, E. The majority of the relevant facts are presented throughout the argument, but the following two sections briefly discuss the background of Nilsen's CPA claims and the proceedings below.

A. Quality and M & H begin a nonjudicial foreclosure of Nilsen's home on behalf of multiple entities claiming to be the beneficiary of the Deed of Trust as defined by RCW 61.24.005(2)

On May 28, 2010, Quality started the nonjudicial foreclosure process against Nilsen when it received a referral from Aurora Loan Services, LLC ("Aurora"). CP 304:3-4. Quality received all directives and information related to the Nilsen nonjudicial foreclosure electronically over the Lender Processing ("LPS") and IDS Systems. CP 306:9-10. Trustee companies, including Quality, use these online platforms provided by a third party as a substitute to direct communication with their loan servicer clients to process nonjudicial foreclosures. *Id.* Quality does not have possession, custody, or control of documents in the LPS/IDS System

itself. CP 304:12-15. Rather, Quality provides its clients with form beneficiary declarations for notarization and signature and without any cursory investigation or verification of the statements therein, Quality pursues nonjudicial foreclosure. CP 305:4-11.

At some point, Quality received an LPS Desktop notification that the loan transferred from Aurora to Nationstar. CP 304:5-7. Between February and July 2013, Quality and M & H were communicating with their client, Nationstar in order to procure from Nationstar a "Declaration of Ownership." CP 342-45. In one such communication, Monica Rivera, identified as M & H employee, states "Please provide a status on the Declaration of Beneficiary for this file. Please provide a declaration as soon as possible." CP 343. On July 11, 2013, Quality received the Nationstar Beneficiary declaration and continued the nonjudicial foreclosure. CP 309:2-3.

Quality issued a Notice of Default on October 21, 2013 stating:

> The current owner of the Note secured by the Deed of Trust is:
> NationStar Mortgage, LLC
> c/o Nationstar Mortgage, LLC
> 350 Highland Drive,
> Lewisville, TX 75067
> 888-811-5279

CP 251-52. In addition, Quality listed its address as:

> Quality Loan Service Corporation of Washington
> c/o Quality Loan Service Corp.

2141 5th Avenue
San Diego, CA 92101
(866)645-7711

Id. After receiving the Notice of Default, Nilsen sent Quality a letter seeking information. CP 254-60. The letter stated in part:

> Due to duplicative and conflicting correspondence from various parties I am uncertain who the real and lawful "Creditor" of my loan is, or if ones continue to exist, and therefore require the proof identified above that any party claiming to be the "Creditor" does in fact own, possess, or have any interest in the alleged debt.

CP 258. Nilsen also explicitly told Quality that he contested Nationstar as the beneficiary and did not believe Nationstar had any ownership interest in his note. CP 254-55

Despite Nilsen putting Quality on notice that Nationstar did not possess an ownership interest in his note, Quality did not take any actions regarding Nilsen's concerns. Instead,Quality issued Nilsen a Notice of Trustee Sale on November 26, 2013 stating Nationstar was the Beneficiary by virtue of an assignment from MERS as nominee for Paul Financial, LLC. despite the fact Quality previously recognized MERS' interest was not that of a beneficiary by requesting the second Appointment of Successor Trustee. CP 270-74.

In addition, the Notice of Trustee Sale included two different addresses for Quality. CP 270-74. In a document entitled. "Important

Notice Regarding Washington Payoff and Reinstatement Requests" where Quality directed the Nilsens to send payoff or reinstatement requests to:

> Quality Loan Service Corp. of Washington
> 19735 10th Avenue NE, Suite N-200
> Poulsbo, WA 98370
> Phone Number (866) 645-7711 Ext. 5318

Id. Also, in the Notice of Trustee Sale, Quality listed its mailing address as the same San Diego address in the Notice of Default. *Id*; CP 252.

In addition to the letter to Quality, Nilsen also sent Nationstar a letter seeking information on his loan. CP 239 ¶ 2. Nationstar responded by letter dated December 11, 2013, which stated in part:

> Our records indicate that DEUTSCHE BANK as trustee for RALI Series 2007-Q02, is the current owner of the loan. As requested, we have provided the address and phone number below:
>
> Deutsche Bank National Trust Company as Trustee
> 1761 E. St. Andrew Place
> Santa Ana, CA 92705
> 714.247.6000

CP 245-246.

Based on the information and direction provided by Nationstar, Nilsen sent two letter to Deutsche Bank. CP 241 ¶¶ 12-13, 279, 283. Months passed with no response. CP 241 ¶ 12-15.

Confused about the inconsistent information he had received regarding who owned his note, Nilsen sent another letter to Quality at its mailing address on March 7, 2014. CP 262. Nilsen asked Quality to

explain why it claimed Nationstar was the owner when Nationstar itself stated it did not own the Loan. *Id.*

After Nilsen sent the letter, Nilsen received a notification that Quality had changed its mailing addresses for their Washington and California offices, but there was no indication of when the changes were effective. CP 277. The new addresses were not the same from those listed on the Notice of Default and Notice of Trustee Sale. *Compare* CP 207, *with* CP 252, 270-74.

Quality never responded to Nilsen's second letter and claims it never received it. CP 309:8-24. However, the same employee that signed the return receipt for the first letter also signed the return receipt for the second on March 20, 2014. CP 268.

Unable to get a response from Quality, Nilsen continued to investigate and sought an attorney for help. CP 240 ¶ 9. Given Quality's failure to respond to his concerns and the conflicting information he had been given, Nilsen filed a complaint contesting the nonjudicial foreclosure. CP 1-120. In response to being alerted that Nilsen had obtained counsel to contest what was occurring, Ashley B Hennessee, identified as corporate counsel for Quality, gave the instruction on April 25, 2014: "Proceed to sale tomorrow. No GF [good faith] postponement needed." CP 329. The very next day, Nationstar, Quality's client, sent

Quality instructions to, "Place file on hold for litigation." CP 328.

Finally, in July 2014, Nilsen received a letter in the mail from OCWEN. which stated, "As a result of the Chapter 11 ResCap Bankruptcy filing, GMAC mortgage (GMACM) assets were sold to Ocwen Loan Servicing Effective February 16, 2013." CP 283. Further, the letter told Nilsen to contact Aurora Loan Services. *Id.*

B. The Proceedings Below

Nilsen filed a complaint in Pierce County Superior Court on April 22, 2014 contesting various aspects of the nonjudicial foreclosure that had been initiated against him by the Respondents. CP. 1-120. The day before the mandatory court review where parties are given a case schedule in Pierce County, Nationstar and Deutsche Bank filed a motion for summary judgment and Quality and M&H filed a separate motion for summary judgment along with their answer to Nilsen's complaint. CP 121-39, 199-210. The motions were heard on October 10, 2014 and the superior court granted both Nationstar/DB's Motion for Summary Judgment and Quality and M&H's Motion for Summary Judgement.[1] CP 584-88.

IV. ARGUMENT

Nilsen will present the standards of review and then discuss why the Respondents failed to meet their initial burden under CR 56(c) to

[1] The trial court did not indicate the basis for its ruling. (VP 18:14-19:1.)

show, by admissible evidence, that no genuine issue of material fact exists. Lastly, Nilsen will discuss the genuine issues of material fact that exist regarding Nilsen's claims under the CPA for unfair or deceptive conduct arising out of the wrongful initiation of a nonjudicial foreclosure.

A. Standard of Review Regarding a Summary Judgment Motion

A Superior Court's ruling on summary judgment is reviewed de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Appellate courts must perform an independent inquiry of all materials before the Superior Court to determine whether summary judgment was appropriate. *Id.* (citing *Mountain Park Homeowners Ass'n v. Tyings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994)).

On a motion for summary judgment, the court must view the facts and *all* reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 687-688, 317 P.3d 987 (2014) (citing CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). Summary judgment is proper only where there are no genuine issues of material fact. *Amalgamated Transit v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000); CR 56(c).

The moving party has the burden of establishing the absence of an issue of material fact beyond a reasonable doubt. *Alhadeff v. Meridian on*

Bainbridge Island, LLC,167 Wn.2d 601, 611, 220 P.3d 1214 (2009) (citing *SAS Am., Inc. v. Inada*, 71 Wn. App. 261, 263, 857 P.2d 1047 (1993)). A genuine issue of material fact exists where reasonable minds could differ on, or otherwise draw different conclusions from, the facts controlling the outcome of litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886, (citing *e.g. Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

In granting summary judgment, it must be beyond dispute that a reasonable person could not find in favor of the party against whom the judgment is entered. CR 56(c); *Folsom*, 135 Wn.2d at 663.

> The respective burdens imposed on the moving and nonmoving party by CR 56 are sometimes confusing. Two related points must be kept in mind. First, while the defendant moving for summary judgment is not required to submit affidavits in support of his motion, CR 56(b), this does not mean he does not bear a genuine and substantial burden in supporting his motion. *While CR 56(e) requires the nonmoving party to come forward with facts showing a material issue of fact, this does not occur unless and until the defendant meets his initial burden of showing that there is no issue of material fact.*

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part, dissenting in part) (emphasis added); *accord Folsom*, 135 Wn.2d at 663 (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)).

B. Defendants did not meet their burden under CR 56 to show by admissible evidence no genuine issue of material fact exists

Admissibility of evidence in summary judgment is reviewed de novo. *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75, 292 P.3d 128 (2012).

The Superior Court impermissibly founded its summary judgment order on a declaration sworn to by Fay Janati. *See* CP 584 at ¶ 3; CP 587 at ¶ 2. Ms. Janati announced she was reciting Nationstar's business records and stated the following: (1) Aurora Loan Services and then Aurora Bank possessed Nilsen's Note indorsed in blank and the Deed of Trust, **either** directly or through its authorized document custodians, from April 23, 2008,[2] to June 30, 2012, CP 155 at ¶ 6, (2) Nationstar possessed Nilsen's Note from July 1, 2012, to present, CP 155 at ¶ 7, (3) the owner of Nilsen's loan is Deutsche Bank as Trustee for RALI Series 2007-Q02, CP 156 at ¶ 8, and (4) Nilsen was $80,722.45 in arrears and the unpaid principal balance of the loan was at least $196,382.22. Based on the content of Ms. Janati's declaration, the Superior Court granted Nationstar

[2] Ms. Janati does not specify who possessed the Note from February 8, 2007 to April 22, 2008. This matters because if Aurora Loan Services and Aurora Bank were transferred possession of Nilsen's Note without the transferor intending to grant Aurora Loan Services and/or Aurora Bank the right to enforce Nilsen's Note, Aurora Loan Services/Aurora Bank could not be a "holder." *See* RCW 62A.3-201 (to be a holder, there must be a transfer of possession of the instrument), *see also* RCW 62A.3-203(a) (an instrument is transferred when it is delivered by a person other than the issuer for the purpose of enforcing the instrument).

Mortgage LLC and Deutsche Bank's Motion for Summary Judgment. CP 584-86.

There are multiple problems with Ms. Janati's declaration: (1) it contains inadmissible hearsay that meets no exception, (2) it runs afoul of the best evidence rule; and (3) it lacks credibility.

1. Ms. Janati's Declaration Cannot Support Summary Judgment Where It Contains Hearsay Meeting No Exception To Admission

Courts may only consider admissible evidence in ruling on a motion for summary judgment. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365-66, 966 P.2d 921 (1998). Ms. Janati's declaration should bear no weight at summary judgment where it contains hearsay[3] evidence that meets no exception to admission. *See SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) (citing *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 506–07, 546 P.2d 75 (1976) (affidavits based on hearsay[4] evidence bear no weight at summary judgment).

Although a declaration by itself is not hearsay, Ms. Janati swore to the contents of documents absent from the court record. CP 154-56. Ms. Janati did not have personal knowledge of the facts in Nationstars records, and she offered information from those documents for the truth of the

[3] Hearsay is an out of court statement offered for the truth of the matter asserted. ER 801(c).

[4] Hearsay is generally inadmissible. ER 802.

matter asserted. *Id.* CR 56(e) requires affidavits be made on personal knowledge. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 86, 272 P.3d 865 (2012). Those portions of Ms. Janati's declaration constitute hearsay because she recited information from another declarant, in this case Nationstar records. ER 801. By not submitting these documents into the record, her reading of the documents acts as an out of court declaration. *See Cameron v. Boone*, 62 Wn.2d 420, 427, 383 P.2d 277. (1963) (hearsay includes testimony sourced, not upon personal knowledge, but in written word of another).

Thus, the information offered by Ms. Janati is hearsay within hearsay because the information comes from documents, which are themselves hearsay. *State v. Monson*, 53 Wn. App. 854, 862, 771 P.2d 359 (1989) *aff'd*, 113 Wn. 2d 833, 784 P.2d 485 (1989) (citing ER 805) (business records are hearsay). Hearsay within hearsay is admissible, if each part meets an exception, ER 805; however, a business record can never meet the hearsay exception unless the document itself is being offered into evidence. *See* RCW 5.45.020.

> **A record** of an act, condition or event ... shall be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as

to justify its admission.

RCW 5.45.020 (emphasis added).

This statute does not provide for later summaries or declarations of these records and Washington Courts strictly construe the business records exception. *State v. Finkley*, 6 Wn. App. 278, 280, 492 P.2d 222 (Div. I, 1972), *rev. denied*, 80 Wn.2d 1007 (1972). As Respondents have not attached these records, Ms. Janati's testimony of their contents is inadmissible hearsay, and the Superior Court could not consider related portions of Ms. Janati's declaration in making its order.

ER 1006 allows a party to submit a summary of voluminous records when the originals are inconvenient for the court to inspect, but that party must make the records available for the opposing party. *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 860, 292 P.3d 779 (2013) (expert witness summary of calendar permissible where complete calendar was properly admitted to record). Respondents have not made any Nationstar records available to Nilsen for examination or copying. Ms. Janati purports to summarize unidentified business records of Nationstar and other companies without specifically identifying the records she is summarizing and without even making those records accessible to Nilsen; her summaries of these unidentified records do not meet the hearsay exception.. *Zink v. City of Mesa*, 140 Wn. App. 328, 347, 166 P.3d 738,

747 (2007), *as amended on reconsideration* (Oct. 23, 2007) (remanded for trial court to direct parties to satisfy conditions of ER 1006 as a condition precedent to considering a summary).

RCW 5.45.020 further requires records be produced by a custodian or identified by one who has supervised the record's creation. *See State v. Smith*, 16 Wn. App. 425, 433, 558 P.2d 265 (Div. II, 1976), *rev. denied*, 88 Wn.2d 1011 (1977).

Ms. Janati identifies Aurora Loan Services as servicing the loan from April 23, 2008, until July 21, 2011, CP 155 ¶ 6, but does not testify as to the manner of how Aurora Loan Services kept its records. *See generally id.* There is no admissible evidence in the record which would qualify Ms. Janati to authenticate and testify regarding the mode, method, or even the identity of the records of Aurora Loan Services (and other potential servicers)[5] Ms. Janati based her declaration on.

Here, Ms. Janati testified that she is familiar with Nationstar's practices and procedures in making and maintaining Nationstar's business records, and that she is familiar with the process by which Nationstar's records are made. CP 154-5 at ¶¶ 1-2. Ms. Janati also testifies that Nationstar's business records include the servicing records related to the

[5] Homecomings Financial, LLC, serviced the loan before Aurora Loan Services. *See* CP 286. Homecomings Financial, LLC, and Aurora Loan Services' records are also included in Nationstar's records from which Ms. Janati bases her declaration.

loan at issue that were generated prior to Nationstar becoming the servicer of Nilsen's loan. CP 154 at ¶ 2. Ms. Janati did not testify she had supervised the creation of any of the records. Ms. Janati further did not testify regarding Aurora Loan Services' records in any form.

Furthermore, when a party seekings to admit evidence under business record exception, the opposing party may cross examine the custodial witness to determine the soundness of the methods used to create and maintain those records; by reducing any records to a declaration, Respondents strip this opportunity from Mr. Nilsen. *See Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn. 2d 188, 195, 668 P.2d 571 (1983) (cross examination revealed that evidence submitted under a business record exception to hearsay did not meet the requirements).

If Nationstar's records indicate who possessed the Note from April 23, 2008, to the present, who the owner of Nilsen's Note is, and how much Nilsen allegedly owes to Nationstar, the Defendants need to identify and introduce those records for them to be admissible under RCW 5.45.020. This will likely be difficult, if not impossible, because Nationstar was not the servicer during that entire period of time. Therefore the records that Nationstar is relying on for those statements are based upon records that are not its own.

The law is clear; 1) any information contained in records that are

not Nationstar's records is inadmissible: and, 2) in order to use the business records exception, Nationstar must introduce the actual business record into evidence after it is properly authenticated by someone who supervised the record's creation has properly testified in compliance with the statute. RCW 5.45.020. Because 1) the Declaration of Ms. Janati does not introduce the business records relied on by Ms. Janati, the factual assertions within Ms. Janati's declaration are inadmissible hearsay, and 2) Ms. Janati summarizes an entity's records that she has no knowledge of their creation,the Court erred by granting summary judgment based on her inadmissible testimony.

2. Ms. Janati's Declaration Violates the Best Evidence Rule

To prove the content of awriting, the original is required, except as otherwise provided. ER 1002. The wisdom of the best evidence rule rests on the fact that a document is a more reliable, complete, and accurate source of information as to its contents and meaning than anyone's description. *State v. Modesky*, 15 Wn. App. 198, 201, 547 P.2d 1236 (1976) (citing *Gordon v. United States*, 344 U.S. 414, 421, 73 S.Ct. 369, 97 L.Ed. 447 (1953)). Here, Defendants have not even supplied Nilsen with copies of these records, so for the purposes of these arguments only, Nilsen will consider Ms. Janati's declaration a "copy," although Ms. Janati's declaration is significantly less reliable and trustworthy than a

photocopy of Nationstar's records.

"To prove the contents of a corporate record, the original writing is required unless it cannot be obtained by any judicial process or procedure." *State v. Mahmood*, 45 Wn. App. 200, 203, 724 P.2d 1021, (1986) (citing ER 1002 and 1004). "To the extent that the matter is a corporate act or is not one of personal knowledge but can be proved only by resort to corporate records, the best evidence rule applies." *State v. Mahmood*, 45 Wn. App. 200, 203, 724 P.2d 1021 (1986) (citing *See State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

ER 1003 requires a party to submit an original, not a copy, when "a genuine question is raised as to the authenticity of the original"--however, the issue of admissibility of an original and not a copy is not at issue where Respondents have not even submitted a copy of the Nationstar records reflected in Ms. Janati's declaration. *Braut v. Tarabochia*, 104 Wn. App. 728, 732, 17 P.3d 1248 (2001). Nilsen raises genuine questions as to the authenticity of the records Ms. Janati purportedly relies on; without attaching them, and without cross-examining Ms. Janati, it is uncertain whether these documents actually exist.

To the extent these rules apply, the facts contained in the declaration of Janati are inadmissible, and this court should reverse and remand for additional proceedings. Further, this court should order the

original records and not copies and certainly not Ms. Janati's declaration be required by the trial court.

3. The Court Erred when It Relied on the testimony of a Declarant whose credibility had been impeached.

If there is a genuine issue of credibility of a party's evidence, a trial court must deny a motion for summary judgment to avoid resolving a genuine issue of credibility. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977). An issue of credibility is present if there is contradictory evidence or the movant's evidence in impeached. *Id.* (citing *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963)).

Ms. Janati declared that Deutsche Bank as trustee for RALI Series 2007-Q02 owned Nilsen's loan. CP 156 at ¶ 8. Nilsen impeached this testimony, and created a genuine issue of material fact, by introducing the letter from Ocwen that stated the loan had been "purged" from the trust in 2008. CP 283.

C. Summary Judgement was improper when Nilsen raised genuine issues of material fact that Respondents violated the CPA

The court below erred when it found there was no genuine issue of material fact concerning whether Respondents violated Washington CPA when Nilsen presented evidence he had been injured by Respondent's misrepresentations of the stakeholder of his note and Respondents'

unlawful action in proceeding with a nonjudicial foreclosure against him when they lacked the requisite authority to invoke the procedures of the DTA to sell his home. Respondents' activities are not unique to Nilsen, but represent standard operating practice for these entities, who are in the business of foreclosing.

Under the CPA, the Plaintiff has the burden of proving each of the following elements: (1) that defendants engaged in an unfair or deceptive act(s) or practice(s); (2) that the act(s) or practice(s) occurred in the conduct of the defendant's trade or commerce; (3) that the act(s) or practice(s) affected the public interest; (4) that Plaintiff was injured; and (5) that defendant's' act(s) or practice(s) caused the Plaintiff's injury. *See* RCW 19.86; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787-93, 719 P.2d 531 (1986). A violation of the CPA may be based on "a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Wash. Mut.* 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

1. DTA violations are recoverable under the CPA

Violations of the DTA are no longer actionable under the DTA itself in the absence of a completed foreclosure sale. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 416, 334 P.3d 529 (2014) ("We

hold that the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed...at least not pursuant to the DTA itself.") However, pre-sale DTA violations are still actionable under other statutes or causes of action. *See e.g. id.* (DTA violations may be actionable under the CPA where no foreclosure sale has occurred); *Lyons v. U.S. Bank, N.A.*, 181 Wn.2d 775, 784, 792, 336 P.3d 1142 (2014) (conduct during foreclosure before sale may give rise to CPA and common law intentional infliction of emotional distress causes of action); *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 319, 976 P.2d 643 (Div. III, 1999) (interpreting Criminal Profiteering Act to permit private plaintiffs to obtain relief based on unlawful activity in a foreclosure despite no sale).

2. Nilsen raised genuine issue of material fact indicating Respondents' actions were violations of the DTA and unfair or deceptive under the CPA

Liability under the CPA may be predicated on an unfair act. *Klem*, 176 Wn.2d at 782. The term unfair is not defined in the statute because "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." *Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) (*quoting State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1984)).

Liability may also be predicated upon deceptive acts. RCW 19.86.020. "The implicit understanding is that 'the actor *misrepresented* something of material importance." *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (Div. 1, 2010) *quoting Hiner v. Bridgestone/ Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (Div. III, 1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). "To prove that an act or practice is deceptive, neither intent nor actual deception is required." *Kaiser*, 161 Wn. App at 719. "Even accurate information may be deceptive 'if there is a representation, omission or practice that is likely to mislead.'" *Id.*

The following sections cover the multiple acts committed by the Respondents that Nilsen raised as unfair or deceptive. Nilsen will discuss the respondents' action of misrepresenting the owner of his note and preventing him access to the stakeholder, initiating a nonjudicial foreclosure when Respondents own proof established Nationstar was not the beneficiary under RCW 61.24.005(2), Quality's utilization of the DTA without authority when it was appointed successor trustee by multiple entities who were not the beneficiary in violation of RCW 61.24.010(2), Quality's violation of its duty of good faith under RCW 61.24.010(4), Quality's improper reliance upon a declaration by Nationstar as a basis for issuing a notice of trustee sale in violation of RCW 61.24.030(7), and

Quality's failure to maintain a physical address in the state of Washington and its blatant disregard for Nilsen's correspondence in violation of RCW 61.24.030(6) and RCW 61.24.010(4).

i. Nilsen presented undisputed evidence that he was deceived by Respondents' misrepresentation of who owned his note.

Nilsen put forth undisputed evidence that Respondents collectively denied him the opportunity to negotiate with the stakeholder of his note when they misrepresented who owned his note. This action defies the very purpose of the DTA, which was to create a system where a borrower could negotiate with the beneficiary[6] and owner[7] of their loan. *Bain v. Metro. Mortg. Grp., Inc*, 175 Wn.2d 83, 103, 285 P.3d 34 (2012). "The legislature was attempting to create a framework where the stakeholders could negotiate a deal in the face of changing conditions." *Id.* Importantly, possession of a note does not establish ownership of that note.

The deception began when Nilsen received a Notice of Default from Quality Loan Service Corp. ("Quality") on October 21, 2013, which stated:

The current owner of the Note secured by the Deed of Trust is:

---

[6] as defined by RCW 61.24.005(2)

[7] "If the original lender had sold the loan, that purchaser would need to establish **ownership** of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its "interests" would not accomplish this."*Bain*, 175 Wn. 2d at 111.(emphasis added).

NationStar Mortgage, LLC
c/o Nationstar Mortgage, LLC
350 Highland Drive,
Lewisville, TX 75067
888-811-5279

CP 251-52.

Confused about who possessed and owned his note and deed, Nilsen sent a QWR to Nationstar, in a letter dated November 2, 2013 seeking information on his loan. CP 239. Nationstar responded by letter dated December 11, 2013 which stated in part:

> Our records indicate that DEUTSCHE BANK as trustee for RALI Series 2007-Q02, is the current owner of the loan. As requested, we have provided the address and phone number below:
>
> Deutsche Bank National Trust Company as Trustee
> 1761 E. St. Andrew Place
> Santa Ana, CA 92705
> 714.247.6000

CP 245-48. In addition, Nationstar told Nilsen to contact Deutsche Bank as Trustee for RALI 2007-Q2. *Id.*

Following Nationstar's instruction, Nilsen wrote two letters to Deutsche Bank seeking information on his loan. CP 279; CP 281. Deutsche Bank never responded. CP 241. Instead, on July 9, 2014, Nilsen received a letter from Ocwen Financial Corporation. 283-289. Ocwen informed Nilsen that it was the current Master Servicer for RALI 2007-Q02 and that his loan had been purged from the trust. Nilsen Decl. 283-

289. Based on this conflicting information, Nilsen continued to research and hired an attorney to investigate. CP 240 ¶ 9, 241 ¶ 18-20.

The record is clear. Quality represented to Nilsen on multiple occasions that Nationstar was the owner and beneficiary of his note. CP 251-52, 271. By Nationstar's own statements to Nilsen and to the court, Nationstar is not, nor has it ever been, the owner of Nilsen's note or deed of trust; Nationstar is simply a loan servicer. CP 155 ¶ 7, 156 ¶ 8, 246.

In *Bain*, the court found that characterizing MERS as beneficiary was deceptive under the first prong of the CPA for a multitude of reasons. *Bain*, 175 Wn.2d at 117. One of the reasons that the court used for coming to this conclusion was based on MERS' being used to conceal the true party in interest, "Many other courts have found it deceptive to claim authority where no authority existed and to conceal the true party in a transaction." *Bain*, 175 Wn.2d at 117 (citing *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (2007); *Floersheim v. Fed. Trade Comm'n*, 411 F.2d 874, 876-77 (9th Cir. 1969). Similarly, Division One in *Kaiser* also held that concealing information in a transaction violated the CPA. *Kaiser*, 161 Wn. App. at 721. There, the court held that the defendant violated the CPA by becoming the power of attorney for property owners who were facing a tax foreclosure when he was concealing the amount of tax overage funds he would receive as a result of

the transaction. *Id.* at 720-21.

Here, MERS was listed on Nilsen's Deed as the beneficiary. CP 174. A deceptive act under *Bain*. 175 Wn.2d at 117. In addition, Nilsen was given conflicting information by all Respondents as to who owned his note and deed of trust, a materially important piece of information for an individual, such as Nilsen, facing a nonjudicial foreclosure that he believes is wrongful. CP 239-293. Akin to a homeowner not being given material information in a tax sale, Quality was issuing foreclosure notices to forcibly take Nilsen's home, on the basis that it was proceeding on behalf of Nationstar, "the current owner of the Note secured by the Deed of Trust is Nationstar" even though Nationstar was not the owner. *Compare Kaiser*, 161 Wn. App. at 721 (misrepresentation of material importance) with CP 239 (Notice of Default lists Nationstar as owner); CP 246 (Nationstar lists owner as Deutsche Bank). When Nilsen brought this to Quality's attention, Quality ignored Nilsen and proceeded with the nonjudicial foreclosure. CP 240 ¶¶ 4-9.

ii. Nationstar was not the owner of Nilsen's note as required by RCW 61.24.030(7) and was not the beneficiary under RCW 61.24.005(2).

In violation of RCW 61.24030(7)(a), Respondents recorded and transmitted a Notice of Trustee's Sale listing Nationstar as the owner and beneficiary when Respondents knew that information was untrue. CP 251-

52. It is undisputed that Nationstar was not the owner of Nilsen's note. CP 156 ¶ 8; 553: 4-10.

Instead, the Respondents argued Nationstar was a "beneficiary" entitled to nonjudicially foreclose under the DTA because Nationstar, the loan servicer, possessed the Note and was therefore entitled to enforce the Note. CP 125:18-127:3; CP 154-156. However, the Supreme Court in *Bain* was clear when it said, "If the original lender had sold the loan, that purchaser would need to establish **ownership** of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. *Bain*, 175 Wn.2d at 111. Having MERS convey its "interests" would not accomplish this." *Id.* The court reiterated this concept when it stated in *Lyons* that. "*Bain* emphasized that the act requires a trustee to have proof that the beneficiary is the actual owner of the note to be foreclosed on." *Lyons*, 181 Wn.2d 789 (*citing Bain*, 175 Wn.2d at 102.)

Respondents reliance upon Ms. Janati's statements that Nationstar, or an authorized document custodian, is in possession of the note are not sufficient to establish it is the beneficiary or the actual owner. RCW 61.24.005(2); CP 155 ¶ 7, *see* discussion *supra*. To be clear, this case is not about whether Nationstar was entitled to enforce Nilsen's Note; it is about whether Nationstar was a "beneficiary" and owner entitled to initiate

nonjudicial foreclosure proceedings under the DTA. Importantly, being a person entitled to enforce a note does not also make one a beneficiary under the DTA. *See Lyons*, 181 Wn.2d at 789-92.

RCW 61.24.005 defines "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." A party becomes a holder by (1) acquiring possession of a negotiable instrument, RCW 62A.3-201, (2) that is properly endorsed, RCW 62A.3-201, (3) that was delivered for the purpose of giving to the person all rights in the instrument, RCW 62A.3-203(a), (d).

RCW 62A.3-301 makes clear that a "holder" under Ch. 62A.3 RCW is distinct from a person entitled to enforce. Importantly, a person entitled to enforce a note may be a holder, a non-holder in possession of the negotiable instrument, or a person not in possession who is entitled to enforce the promissory note. RCW 62A.3-301. RCW 62A.3-301 states that a person may be entitled to enforce an instrument even though it is in wrongful possession of the instrument, and therefore not a holder under RCW 62A.3. Mere possession of an indorsed in blank note does not make the possessor a holder under the RCW 62A.3 or the actual owner of the note.

In *Bain*, Washington's Supreme Court referenced former RCW

62A.1-201(20)[8] and RCW 62A.3-301 to dispense with MERS' argument that as "holder" of the deed of trust it was a beneficiary. 175 Wn.2d at 104. The Court in Bain did not say that possessing a note made the possessor a beneficiary or owner. *Id.* The court stopped its analysis of whether MERS was a beneficiary because it had never possessed the note, or had ownership of the note, but the court made clear that in order to foreclose a deed of trust the foreclosing entity must be the actual owner of the note. *Id*; *accord Lyons*, 181 Wn.2d at 789.

In *Lyons*, the Supreme Court examined a declaration which stated the purported beneficiary was a holder or person entitled to enforce under the RCW 62A.3-301:

> we find, consistent with *Beaton*, that the declaration at issue here does not comply with RCW 61.24.030(7)(a). On its face, it is ambiguous whether the declaration proves Wells Fargo is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3-301.

Lyons, 181 Wn.2d at 791 (*Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2013 WL 1282225 (Mar. 26, 2013)). Accordingly, possession alone is not enough to establish one is a beneficiary. *Id.*

Thus, Respondents' arguments regarding Nationstar's status as a person entitled to enforce the Note were legally irrelevant to determining

[8] Currently RCW 62A.1-201(21) though no change to the language was made.

whether Nationstar was a "beneficiary" as defined by the the DTA. *See* RCW 61.24.005(2). Further, in addition to the plethora of evidentiary issues discussed *supra*, Nationstar did not even declare Nationstar possessed the note. CP 155. What Ms. Janati declared was based on a review of Nationstar's records. " Nationstar has serviced the loan and continually possessed the Note and Deed of Trust from July 1, 2012 to the present, either directly **or through its authorized document custodians**." CP 155 ¶ 7. Nationstar provided no factual basis for the statement or details on the physical location of the note and deed of trust. *Id.* Further, Nilsen submitted evidence impeaching Nationstar's business records as untrustworthy. *Compare* CP 245-47 (Nationstar declares Deutsche Bank the owner) *with* 283 (Ocwen provides conflicting information that Nilsen's note was purged from the trust.)

If respondents are right and it does not matter who the actual owner or holder of the note is because a beneficiary only needs to possess the note, then what Nationstar has declared is that based on a review of its business records "an authorized document custodian" is the beneficiary. *Id.* An untenable argument, now disposed of by the Washington Supreme Court decision in *Lyons*. *Lyons*, 181 Wn.2d 775.

iii. Nilsen raised a genuine issue of material fact that Quality was not properly appointed as successor trustee by a proper beneficiary.

Quality lacked the authority to initiate a nonjudicial foreclosure against Nilsen because it was never appointed successor trustee by a proper beneficiary as defined by RCW 61.24.005(2). Only a proper beneficiary may appoint a successor trustee. RCW 61.24.010(2). "[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 14, 311 P.3d 31 (Div. I, 2013); *see also Bavand v. One West Bank, FSB*, 176 Wn. App. 475, 488, 309 P.3d 636 (Div. I, 2013) ("[w]ithout a proper beneficiary making the appointment, [the trustee] was not vested with any of the powers of the original trustee under th[e] deed of trust").

Quality facilitated the recording of its own appointment when it recorded an Appointment of Successor Trustee that was signed by Susan Hurley, Vice President of MERS on behalf of MERS as the beneficiary. CP 323. This document was recorded on June 21, 2010, in Pierce County under auditor number 201006210278. CP 323-24. Susan Hurley is an employee of Quality, not MERS. CP 311: 6-15. Four months later, Quality had a second Appointment of Successor Trustee recorded, which was signed on October 6, 2010 by Ivet Oneth, Assistant Vice President of

Aurora Loan Services, LLC in Pierce County under auditor number 201010220022. CP 144-45. Both MERS and Aurora stated in the Appointments that they were signing as the beneficiary. CP 144, 323.

Both Appointments are identical in form. *Compare* CP 144-45 *with* 323-24 The only noticeable difference is the beneficiary name and signature. *Id.* Both documents list instructions to please return to Quality Loan Service Corp. of Washington and include the Trustee Sale number in the body, TS# WA-10-365535-NH. CP 144-45; 323-24. This trustee number also appears on Quality's internal communication as a specific way to identify Nilsen's nonjudicial foreclosure. *Compare* CP 144-45;323-24 *with* CP 328. Lastly, Quality instructs LSI Title Company to record these documents on its behalf. CP 503. The first assignment was signed by a Quality employee. CP 323. It is clear from this record, Quality facilitated its own appointment on behalf of an invalid beneficiary. *Id.*

Neither of the Quality created assignments were executed by a valid beneficiary under RCW 61.24.005(2). First, even if Quality had authority to sign on behalf of MERS, MERS had no authority to appoint Quality. *Bain*, 175 Wn.2d 83, 103, 285 P.3d 34 (2012)(The *Bain* Court ultimately held MERS was not a "beneficiary" within the meaning of RCW 61.24.005(2) because under the MERS System, MERS did not hold the note.) This legal nullity was the likely reason Quality recorded a

second appointment of successor trustee. CP 144. Instead of being signed by MERS, it was signed by Aurora. CP 144. However, Aurora was a previous loan servicer, not a beneficiary. CP 155 Servicing Rights are not the same thing as being a beneficiary of the deed of trust. *Bain*, 175 Wn.2d at 97-98, fn. 7; *see generally* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011); Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It*, 37 Pepp. L. Rev. 737, 757-58 (2010).

Accordingly, because MERS and Aurora were not beneficiaries under the DTA, neither assignment vested Quality with the authority required by RCW 61.24.010(2) to initiate a nonjudicial foreclosure against Nilsen. *See Rucker*, 177 Wn. App. at 14; *see also Bavand*, 176 Wn. App. at 488. All Quality's actions were ultra vires of the DTA and constitute an unlawful debt collection. *Id.*

iv. Nilsen raised a genuine issue of material fact that Quality violated its duty of good faith in violation of RCW 61.24.010(4)

Quality failed to act as a neutral independent trustee in violation of RCW 61.24.010(4) when it failed to conduct a cursory investigation into whether nationstar was a valid beneficiary and proceeded with the nonjudicial foreclosure over the valid objections of Nilsen. The DTA

imposes a duty of good faith on a trustee or successor trustee. RCW 61.24.010(4). "In a nonjudicial foreclosure, the trustee undertakes the role of the judge as an impartial third party who owes a duty to both parties to ensure that the rights of both the beneficiary and the debtor are protected." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013).

Further, "A foreclosure trustee must "'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation' to adhere to its duty of good faith." *Lyons*, 181 Wn.2d at 787(citing *Walker v. Quality Loan Serv. Corp. of Wash*, 176 Wn. App. 294, 309-10, 308 P.3d 716 (2013). A DTA trustee "must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith." *Id.* (emphasis added). In *Lyons*, the court reversed the Superior Court's grant of summary judgment in favor of the trustee because the court found there were genuine issue of material fact as to whether the trustee violated the CPA when there was no evidence in the record that the trustee investigated *Lyons* claims that there was a conflict over whether the proper beneficiary had been identified as required by law. *Lyons*, 181 Wn.2d at 788-89, 794.

Similar to the trustee in *Lyons*, Quality was given actual notice by Nilsen that Nationstar was not the beneficiary and owner of his note and deed of trust. CP 254-60, 262. Worse, Quality has no record of Nilsen's

second letter, despite Nilsen's evidence, a certified mail receipt, showing Quality recieved it. *Compare* CP 310:11-14 (Quality does not have a record of the letter) *with* CP 268 (signature from Quality confirming delivery). Quality provided no evidence that it did any investigation over the conflicting information; instead, Quality continued to issue foreclosure notices on behalf of Nationstar. CP 271-74.

Further, Quality's own records demonstrate there was an issue over who the actual beneficiary was. Quality was not referred the nonjudicial foreclosure by Nationstar, but a completely different entity, Aurora. CP. 304: 3-6. Additionally, Quality knew that another entity was the "investor" in regards to Nilsen. CP 503 (Quality listed the trust as the investor in its communication to LSI Title Company). Quality also recorded two different Appointment of Successor Trustees, neither from Nationstar. CP 144-45; 323-24. This information clearly shows Quality knew other entities were also claiming an interest in the ownership of Nilsen's note. Instead of investigations, Quality initiated nonjudicial foreclosure proceedings in Nationstar's name, failing to identify the proper party in interest. 270-74. Quality knew it was foreclosing on behalf of an entity that had not appointed it successor trustee.

The record is clear that Quality only acted upon Nationstar's instruction while ignoring conflicting information, a CPA violation under

the binding authority of *Lyons*. *Lyons*, 181 Wn.2d at 788-89, 794. When Nilsen asked Quality what Quality did to determine the validity of the instructions it recieved, Quality stated that it reviewed the documents produced by the referring entity. CP 304:21-304:11. This is not an investigation, nor is it good faith, but an unreasonable deference to its paying client. *See Lyons*, 181 Wn.2d at 788-89

Nilsen also provided evidence that Quality, and its sister law firm, M&H work together to perform the functions of a trustee and are set up to be systemically biased in favor of their paying clients, the loan servicers and other financial institutions. CP 328-345. Quality and M&H admitted that Nationstar is a client of both. CP. 229 ¶ 12. Nilsen provided evidence that Tom Holthus and Kevin McCarthy are the owners of both Quality and M&H. CP 311:17-20; CP 443. M&H represents banks and other financial institutions and goes so far as to advertise on its website: "We pride ourselves on knowing the judges and the "local-local" rules to effectively represent our lender clients." CP 443.

In addition to Quality and M&H performing trustee functions, they will also bid at their own sales on behalf of their clients, the loan servicers, if retained for that purpose. CP 331.[9] In Washington, Quality

[9] "We will not be bidding at any schedule sale on *your behalf unless Quality* . . . is retained for that purpose."

and M&H currently claim to share the same physical address at 108 1st Avenue South in Seattle, Washington 98104. *compare* 317:7-11 *with* CP 441. In discovery received from Quality, M&H and Quality both use the LPS/IDS system to communicate with each other and their shared client, Nationstar, in conducting the nonjudicial foreclosure as a trustee. CP 328-345. Nilsen showed M&H and Quality have data integration and access to the same file. *Id.*

In an email from Quality's California office on April 2, 2013 to M&H employee, Stephanie Fuentes, Quality stated their client wanted to proceed with the foreclosure of Nilsen's home, but there was a hold on the file. CP 344. The same M&H employee had previously used the system to communicate with the client. *Id.* On March 12, 2013, Ms. Fuentes updated the IDS system and entered special instructions stating: "Please execute and upload. Please refer to uploaded dec. of Ownership. Previous document provided with the Dec of Loss Mit. Thank you." CP 344-45.

In addition, on October 14, 2013 Dante Garza, an M&H employee, made a comment in the IDS system seeking information on the Nilsens. 340. On June 12, 2013 John Pascual, an M&H employee, uploaded the declaration of ownership and asked that it be executed by Nationstar. CP 343. The record in front of the Superior Court demonstrated that Quality and M&H are systemically biased in favor of their "lender clients" and

acted in total disregard of their duty of good faith while proceeding on the nonjudicial foreclosure of Nilsen's home.

This record establishes not only a genuine issue of material fact as to whether Quality and M&H violated the CPA, but also whether their violation also extends to the other respondents. *Klem*, 176 Wn.2d at 790 ("An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale voided, title quieted in the original homeowner, **and subjecting itself and the beneficiary to a CPA claim**.")(emphasis added).

v. Nilsen raised a genuine issue of material fact that Quality improperly relied on a beneficiary declaration from Nationstar

Quality unlawfully relied upon the Declaration of Beneficiary signed by Nationstar Mortgage LLC. (CP 237). Quality had to comply with RCW 61.24.030(7). RCW 61.24.030(7) provides:

> (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW 61.24.030(7)(a)-(b).

In *Lyons*, the supreme court clarified what the trustee's burden of proof is, before a trustee can issue a notice of trustee sale as follows:

> **Although ownership can be proved in different ways,** the statute itself suggests one way: "A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note ...shall be sufficient proof as required under this subsection." RCW 61.24.030(7)(a). Typically, unless the trustee has violated a duty of good faith, it is entitled to rely on the beneficiary's declaration when initiating a trustee's sale. See RCW 61.24.030(7)(b). **But if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty.**

Lyons, 181 Wn.2d at 789-90.

Nilsen argued to the superior court that Quality improperly relied upon a declaration when it violated its duty of good faith, for the reasons states *infra*. CP 544. Further, Nilsen argued and presented evidence that Quality had multiple indications that Nationstar was not the beneficiary and the beneficiary declaration was not true. CP 543-44. Quality was referred the file by a different entity (CP 304:3-4), Quality was appointed twice, by two different entities, MERS and Aurora (CP 323-24, 144-45),

Quality knew a trust was claiming to be the investor (503), Nationstar did not provide any evidence of their authority and only signed a beneficiary declaration after being hounded by Quality for months (CP 342-45), and Nilsen told Quality in multiple correspondences that Nationstar was not the owner or beneficiary of his note (CP 254-60, 262).

In support of its reliance on the beneficiary declaration, Quality argued it was entitled to rely on the beneficiary declaration under the case, *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 326 P.3d 768 (Div. 1, 2014) review granted (Wash., Apr. 02, 2015). CP 551:23-26. Quality argued: "And prior to issuing the Notice of Sale, Quality had its statutory proof -- the Beneficiary Declaration -- confirming that Nationstar was the holder." *Id.* Nilsen explained at length why *Trujillo* did not apply to Nilsen's case because Nilsen was raising genuine issues of material fact that Quality violated its duty of good faith and that Nationstar was not the beneficiary. CP 515:15-517:5, 540:18-541:23. The supreme court in *Lyons* affirmed Nilsen's arguments and has accepted *Trujillo* on review. *Lyons*, 181 Wn.2d at 789-90; *Trujillo*, 181 Wn. App. 484.

Accordingly, under the binding authority of *Lyons*, Quality was prohibited from placing any reliance on the beneficiary declaration from Nationstar. *Lyons*, 181 Wn.2d at 789-90.

vi. Nilsen raised a genuine issue of material fact as to whether the failure of Quality to maintain a physical presence in the state of washington violated RCW 61.24.030(6).

RCW 61.24.030(6) requires a trustee to maintain a physical presence at a street address in Washington prior to issuing the Notice of Trustee's Sale through the date of the trustee's sale. In the Notice of Trustee Sale dated November 26, 2013, Quality listed such address under the heading "Trustee's Physical Address" as "19735 10th Avenue NE, Suite N-200 Poulsbo, WA 98370." CP 273. Quality also listed its mailing address as "2141 Fifth Avenue, San Diego, CA 92101." *Id.*

Quality claims it moved offices January 1, 2014 and was still operating from its Poulsbo office at the time it issued a Notice of Trustee Sale to Nilsen in November 2013. CP 236 ¶ 6. However, having a physical address in the state of Washington prior to issuing the notice is only one requirement of RCW 61.24.030(6). Quality was required to maintain a physical presence through the trustee sale. RCW 61.24.030(6). By Quality's own admission, it did not maintain its physical presence at the Poulsbo address, as required under the DTA. *Id.* Quality provided no evidence that it had a physical address in the state from November to January 1, 2014. *See* CP 236 ¶ 6. Additionally, Quality's self serving statement that it had a physical address in Seattle after January 1, 2014 with telephone service and an employee was contradicted by the evidence

Nilsen presented to the Superior Court. *Id.*; CP 361-62 (letter from the Attorney General of Washington to Quality stating they were violating the law by failing to have a physical location); CP 364-65 (On February 18, 2014, there was no access to the Seattle office and Quality was not listed as a tenant); CP 375-76 (On February 26, 2014, the Seattle location was still locked at 11:40 am and declarant was unable to enter); CP 378-79 (Poulsbo office vacant); CP 381-83 (Seattle location locked at 9:30 am on February 14, 2014).

Quality eventually mailed Nilsen a Notice of Trustee Address Change months after Quality now claims to have moved out of the Poulsbo address, but there was no indication of when the changes were effective. DTA. CP 236 ¶ 6; CP 277. The location of Quality was critically important to Nilsen, who was mailing letters to Quality during this time based off the incorrect information provided to him in his Notice of Trustee Sale. CP 240¶ ¶ 4-6, 9; CP 254-60, 62. Nilsen was spending considerable time and effort attempting to alert Quality to defects in Quality's notice and the nonjudicial foreclosure, which included the different Respondents providing him conflicting information on who owned his note. CP 239-42.

Quality claims never to have received his second correspondence. CP 309:18-24 However, the same employee that signed off on receiving

the first letter also signed off on receiving the second on March 20, 2014. CP 268. The record is clear that Quality failed to provide Nilsen and many other Washington residents with any prior notice of moving and then proceeded for months to act as a trustee without an accessible physical location in the state of Washington in violation of RCW 61.24.030(6). CP 390 ¶ 2 (Quality continued to issue Notices of Trustee Sale with the Poulsbo address). Nilsen was forced to investigate and hire an attorney based on Quality's apathy and nonresponsiveness to Nilsen's growing concerns. CP 240 ¶ 9.

One of the fundamental policies of the DTA is "the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure." *Bain* 175 Wn.2d at 98 (citing *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)). Quality's denial of this opportunity not only violates RCW 61.24.030(6), but also violates Quality's duty, as purported trustee, to "act impartially to both sides" in a nonjudicial foreclosure. *Klem*, 176 Wn.2d 791.

3. Respondents' actions occurred in trade or commerce

Respondents did not challenge this element in their motions for summary judgment. CP 131:14-133:4; CP 203:20-205:4. CP 578-79 (Reply Section on CPA), CP 584-88 (MSJ Order). Accordingly, under RAP 2.5(a) the appellate should refuse to review issues that were not

raised at the trial court. *See e.g. Lindblad v. Boeing Co.* 108 Wn. App. 198, 207, 31 P.3d 1 (Div I. 2001); 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.). However, out of an abundance of caution Nilsen will briefly address the trade or commerce element.

Under the CPA "'[t]rade' and 'commerce' shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2).

Here, Quality admitted in its answer that it is incorporated to do business as a trustee. CP 228 ¶ 3. Nilsen presented evidence that M&H is in the business of providing legal services for servicers and the financial industry. CP 443. Additionally, both cooperatively worked for their mutual client, Nationstar, a loan servicer. 229 ¶ 12; 155 ¶ 7. Nationstar does business in conjunction with Deutsche Bank, who acts as trustee for securitized trusts, allegedly including RALI Series 2007-Q02, which Nationstar claims own Nilsen's note. CP 156 ¶ 8. All respondents are business entities that provide mortgage and/or foreclosure services and accordingly, this element of the CPA is clearly met.

4. Respondents' violations of the DTA and CPA affect the public interest.

In addition to the trade or commerce element, Respondents did not challenge the public interest element in their motions for summary

judgment. CP 131:14-133:4; CP 203:20-205:4. CP 578-79 (Reply Section on CPA), CP 584-88 (MSJ Order). Accordingly, under RAP 2.5(a) the appellate should refuse to review issues that were not raised at the trial court. *See e.g.* 2A Wash. Prac., Rules Practice RAP 2.5 (7th ed.). However, out of an abundance of caution Nilsen will briefly address the public interest element.

The unfair and deceptive practices associated with the nonjudicial foreclosure of Nilsen's property have expansive implications on the larger public interest. Under RCW 19.86.093(3), public interest impact may be met by showing the act or practice "(a) [i]njured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons. In essence, a fact pattern affects the public interest if it is likely that additional plaintiffs have been or will be injured in the same fashion. *Hangman Ridge*, 105 Wn.2d at 790 (citing *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984).

Here, Quality's actions are not unique to Nilsen. In February 2014, Quality came under fire by the Washington State Attorney General's Office for failing to maintain a physical presence in Washington while acting as a DTA trustee. CP 398-439. The Washington State Attorney General Consumer Protection Division's investigation showed that for a period of time, Quality did not have a physical presence in either Poulsbo

or Seattle. CP 361-62; CP 364-65; CP 375-76; CP 378-79; CP 381-83. The record also showed that Quality recorded a high volume of Notices of Trustee's Sale on Washington residents listing the vacant Poulsbo location and the inaccessible Seattle location CP 390 ¶ 2.

Further, Quality recorded two-hundred (200) Notices of Trustee's Sale on King County residents alone in a three (3) month span. *Id.* The systemic bias of Quality and M&H, discussed at length *supra*, prohibit Quality from meeting its statutory imposed duty of good faith on every homeowner in Washington that Quality has conducted a nonjudicial foreclosure on. Quality and M&H's clients, such as Nationstar, are also liable for this lack of neutrality under *Klem*. *Klem*, 176 Wn.2d at 790

Additionally, Respondents' violations of multiple sections of RCW 61.24.030 conclusively satisfy this element. RCW 19.86.093(2) provides that a CPA cause of action "establish[es] that the act or practice is injurious to the public interest because it . . . [v]iolates a statute that contains a specific legislative declaration of public interest impact." Under the MORTGAGE - HOMEOWNERSHIP SECURITY - BUSINESS REGULATIONS ACT, (S.H.B. No. 2770), the legislature announced findings in Laws of 2008, ch. 108, § 1 (codified as amended RCW 19.144.005), which provide "protecting our residents and our economy from the threat of widespread foreclosures . . . is in the public interest."

These findings apply because the legislature amended RCW 61.24.030 of the DTA in that very same act. *See* Laws of 2008, Ch. 108 § 22. For convenience and clarity, the legislature links to public interest findings on its own webpage for RCW 61.24.030.[10] Accordingly, the public interest element is met.

5. The trial court erred by granting Respondents' Motions for Summary Judgment when Nilsen provided evidence he was injured by their actions.

Lastly, to prove a CPA claim, a plaintiff is required to show he "was injured in his or her 'business or property" and also "a causal link ... between the unfair or deceptive acts and the injury suffered. *Hangman Ridge*, 105 Wn.2d at 792-93. Plaintiffs must also show a minimal injury and even "pecuniary losses occasioned by inconvenience may be recoverable as actual damages." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009) (citing *Keyes v. Bollinger*, 31 Wn. App. 286, 296, 640 P.2d 871 (1982); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Under the CPA, defendants' actions must proximately cause plaintiffs' injuries. *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277-78, 259 P.3d 129 (2011) (quoting *Indoor Billboard/Washington Inc. v. Integra Telecom of*

[10] http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.030 (view bottom of page for: "Notes: . . . Findings - - 2008 c 108: See RCW 19.144.005")(last visited April 19, 2015).

Washington, Inc., 162 Wn.2d 59, 82, 170 P.3d 10 (2007).

"A CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt." *Frias*, 181 Wn.2d at 431. "Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded." *Id.* Injuries of "distraction and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions" are sufficient injuries under the CPA. *Walker*, 176 Wn. App. at 320. "Breach and proximate cause are generally fact questions for the trier of fact." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). The CPA does not require a plaintiff to prove that the complained of practices are the *sole* cause of the injury. *Indoor Billboard/WA Inc.*, 162 Wn.2d at 82.("There may be one or more proximate cause of an injury").

Respondents argued below that Nilsen could not show causation under the CPA when they claimed he was in default of his note. CP 131:19-133:4; CP 204:22-205:4. However, this argument is contrary to the binding authority of *Frias*, which supports recovery for Nilsen's time, investigation, and injury as a result of Respondents' violations of the DTA

as recoverable under the CPA. *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014).

Nilsen presented evidence that he began investigating after he received the notice of default from Quality. CP 239-242. Based on Quality's representations that Nationstar owned his note, Nilsen contacted Nationstar for information. CP 239 ¶ 2. However, Nationstar told Nilsen that it did not own his note and that he should contact Deutsche Bank. CP 245-246. In his declaration, Nilsen provided the trial court with copies of the letters and certified mail receipts. CP 239-295. These were sufficient to create a cognizable injury under the CPA. Further, Nilsen declared: "According to the information I received from Nationstar, the owner of my debt is Deutsche Bank, as Trustee for RALI Series 2007-Q02. It is my understanding that Quality Loan Services is seeking to nonjudicial foreclosure on my property on behalf of Nationstar. I believe that Nationstar's attempts to nonjudicially foreclose and Quality's acting on Nationstar's behalf is unlawful debt collection." CP 240 ¶ 10. Additionally, Ocwen told Nilsen that his loan had been "purged" from the trust. CP 283.

The trial court erred in granting Respondents' Motions for Summary Judgment when Nilsen provided evidence that he was caused injury by the conflicting evidence given by all Respondents, the unlawful

debt collection pursued by Quality and Nationstar, and Quality's disregard for his concerns.

V. CONCLUSION

For the foregoing reasons, Nilsen respectfully requests this Court reverse the Superior Court's Orders granting Respondents Motions for Summary Judgment and remand the case back to Superior Court where Nilsen can pursue his claims against Respondents at trial.

Dated this 21st day of April, 2015 at Arlington, Washington.

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CERTIFICATE OF SERVICE

I, Ashley Burns, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 21st day of April, 2015, I caused to be served a true and correct copy of Appellant's Opening Brief to Respondents in the above title matter by causing it to be delivered to:

Andrew Yates John S. Devlin III Lane Powell, PC 1420 5th Ave. Ste 4100 Seattle, WA 98101 yatesa@lanepowell.com devlinj@lanepowell.com	☐Facsimile ☐Express Mail ☒U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ☒Electronic-Email
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DATED this 21st day of April, 2015 at Arlington, Washington.

Ashley Burns
Stafne Trumbull, PLLC